

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petitions No. 70/MP/2018

**Coram:
Shri I. S. Jha, Member
Shri Arun Goyal, Member
Shri P. K. Singh, Member**

Date of Order : 3.8.2022

In the matter of:

Petition under Section 79(1)(c) of the Electricity Act, 2003 read with Regulation 26 of the Central Electricity Regulatory Commission (Open Access in inter-State Transmission) Regulations, 2008 and Regulation 27 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999.

And in the matter of :

Godavari Biorefineries Limited
Somaiya Bhawan, 45/47,
M. G. Road, Fort,
Mumbai- 400001

Versus

State Load Despatch Centre, Karnataka
Ananda Rao Circle, palace Road,
Bangalore- 560009

Parties Present:

Shri Anantha Narayana M G, Advocate for Petitioners
Shri Shridhar Prabhu, Advocate for Petitioners
Shri Siddaveer Chakki, Advocate for Petitioners
Ms. Sumana Naganand, Advocate, SLDC, Karnataka
Ms. Medha M Puranik, Advocate, SLDC, Karnataka

ORDER

The Petitioner has filed the present Petition seeking refund of back-up supply charges collected from the Petitioner by the Respondent. The Petitioner has made the following prayers :

- a) *Declare that the Respondent has no authority under law to collect Back-up Power Supply charges and Fixed Charges from the Petitioner as per Annexure A in an inter State Open Access Transaction being governed by the provisions of the Regulations framed by this Hon'ble Commission;*
- b) *Consequently declare that the Bills issued by the Respondent produced herein and marked as Annexure A as far as Back Up Supply charges are illegal, untenable and opposed to Electricity Act, 2003, Central Electricity*

Regulator Commission (Open Access in Inter State Transmission) Regulations 2008 and CERC regulations 2009 and set aside the same;

c) Declare that making payment for the Unscheduled Energy at Rs 2.80 per unit instead of Settlement at UI rates is illegal and ultra vires the Electricity Act, 2003 and the regulations framed by this Hon'ble Commission, there under;

d) Consequently, direct the Respondent to refund the amount paid by the Petitioner as per towards Back Up Supply Charges along with 1% per month from the date of payment up to the date of refund along with interest in full.;

e) Direct the Respondent to pay the cost of this Petition; and

f) Pass any other orders to meet the ends of Justice.

2. The Petitioner owns and operates 45.6 MW bagasse based cogeneration power plant and sell the power using inter- State open access. The Petitioner is aggrieved as the Respondent has been levying back up supply charge and fixed charges. The Petitioner has further submitted as under :

(a) The levy of back up supply charges and fixed charge is not tenable and is opposed to the Electricity Act, 2003. The Commission in its previous orders involving the same issue has held that such illegal collection of the BSC (Back up Supply Charges) and Fixed Charges for the Inter State Open Access, is illegal and ultra vires the Regulations.

(b) Regulation 20 (6) of the Central Electricity Regulatory Commission (Open Access in inter-State Transmission) Regulations, 2008, prohibits collection of any charges other than those specified in the CERC Open Access Regulations and therefore the Respondent has no authority to collect the BSC in contravention of the Regulations framed by the Commission.

(c) Presuming without admitting that the petitioner drew power from the State Grid, energy drawl should be accounted for as the UI, that is, deviation from the schedule and not by the way of Back of Supply Charges, therefore energy drawl cannot be billed as per the KERC(Terms and Conditions of Open Access) Regulations, 2004, as amended ("Karnataka Open Access Regulations"), as held by the

Commission in its Order dated 19.11.2012 in the matter of Sadashiva Sugars Limited in Petitioner No 1/MP/2012 and other cases.

(d) Clause (viii) of Regulation 11 of the Karnataka Open Access Regulations do not apply to a generating company such as the Petitioner, exporting power by availing the Inter-State open access. Further, the first part of the said KERC Regulation can be invoked when there is failure of contracted supply. However, the Petitioner is a generating company. Hence, there is no application of the contracted supply.

(e) It is not liable to pay the BPS Charges for availing start-up power in the course of Inter-State open access as these charges are levied and collected by the distribution licensee.

(f) The rate of Rs.2.80 per unit seems to emanate from some illegal administrative instructions issued by the Respondents. Quashing these illegal instructions, the Central Commission in the case of 9.10.2012, in the case of Petition No. *124/MP/2011* in the case of Shamanur Sugars Limited vs. KPTCL has stated that it is a settled principle of law that Statutory Regulations cannot be changed through administrative instructions and in case of conflict between Statutory Regulations and administrative instructions, the former shall prevail. The action of the respondents by inserting an illegal clause in the Standing Clearance has virtually changed the provisions of the Commission's Open Access Regulations. Therefore the clause (m) of the Standing Clearance being in violation of the Open Access Regulations was accordingly set aside. Further, the Commission directed the respondent herein to align its Standing Clearance for open access to Inter-State transmission with the provisions of the Open Access Regulations. Furthermore, the respondents were directed to settle the dues of the petitioner from January 2010 onward in accordance with clause (5) of Regulation 20 of Open Access Regulations after sharing the relevant injection and drawal data with the petitioner. The petitioner herein deserves the same remedy from the Commission.

2. The Petition was listed for hearing on admission on 11.12.2018. The Commission admitted the Petition and directed the parties to complete the pleadings.

3. The Respondent vide its affidavit dated 14.10.2019 has submitted as follows:

(a) The Present Petition is not maintainable and is liable to be dismissed. The Petitioner has filed the present Petition challenging the bills for the years 2010, 2013 and 2014. The present Petition has been filed with an inordinate delay and the claims made by the Petitioner are barred by limitation.

(b) It is not in dispute for the period between October, 2010 and December, 2016, the Petitioner was selling power under inter- state open access and was connected to state grid. The Petitioner withdrew power from the State Grid. Therefore, the Petitioner is liable to pay for the energy drawn.

(c) Appellate Tribunal vide its judgment dated 16.4.2019 in Appeal No. 26 of 2013 has held that if energy is drawn from the State grid by the generators, shall be liable to pay in accordance with the Regulation framed by the State Commission.

(d) With regard to the contention of the Petitioner that the tariff being paid to excess energy imported, it is submitted that the Respondent is making payment for excess energy exported at Rs 2.80 per unit as per the Official Memorandum dated 26.12.2013. The tariff of Rs 2.80 per unit is the tariff that is applicable to old generating plants and the contention that the said sum is an ad hoc tariff having no basis is untenable.

4. During the hearing dated 22.3.2022, the Commission directed SLDC, Karnataka to clarify, how an open access consumer like the Petitioner shall be charged in the below mentioned conditions and the same has been replied by SLDC Karnataka vide its affidavit date 13.6.2022 as follows :

Suppose schedule after sale in Power Exchange is 80 MW in each time block between 1PM to 2 PM on a particular day					
Time Block	Schedule injection	Actual Injection/Drawal (+/-)	Query of the Commission	Reply of SLDC Karnataka	
1.00 PM-1.15 PM	80 MW	0 MW	Whether SLDC raises any bill for Deviation? If yes for what quantum and at what rate?	Yes, SLDC raises the Bill as per the clause 3.1 and 3.9 of CERC (Deviation, Settlement Mechanism and Related Matters) and their Amendments from time to time.	
1.15 PM-1.30 PM	80 MW	(-) 20 MW	Whether SLDC shall raise bill for Backup supply charges? Whether discom shall raise bill for backup supply charge?	In case of back-up supply charges, SLDC was raising bills upto May, 2021. From June, 2021 onwards back up supply charges is not being billed by SLDC.	
1.30 PM-1.45 PM	80 MW	40 MW	Whether SLDC shall raise bill for Deviation charges – If yes, for how much quantum and at what rate?	SLDC has raised bill as per clause 3.1 to 3.9 of CERC Regulations 2018 (Deviation, Settlement Mechanism and Related Matters) Regulations 2014 and their amendments from time to time.	
1.45 PM- =.00 PM	80 MW	90 MW	Whether SLDC bills for Deviation charges at what rate and is amount receivable by entity	SLDC has raised bill as per clause 3.1 to 3.9 of CERC Regulations 2018 (Deviation, Settlement Mechanism and Related Matters) Regulations 2014 and their amendments from time to time.	
Suppose from 2pm- 3pm there is no sale schedule					
2.00 PM - 2.15 PM	- MW	(-) 50 MW	Whether DISCOM shall raise bill or SLDC shall raise bill for back up supply charges?	In case of back-up supply charges, SLDC was raising bills upto May, 2021. From June, 2021 onwards back up supply charges is not being billed by SLDC.	

Illustration of billing of Deviation is as under :

Case 1
Schedule 80 MW

Injection 0 MW

SLDC raises the bill for deviation up to 12% (9.6 MW) normal frequency rates and beyond 12% as detailed below :

For under injection above 12% & upto 15% of deviation (in this case for 2.4 MW)- Equivalent to 20% of the cap rate of deviation of 303.04 paisa/kwh or the charge for deviation corresponding to average grid frequency of the time block, whichever is less.

For under injection above 15% & upto 20% of deviation (in this case for 4 MW)- Equivalent to 40% of the cap rate of deviation of 303.04 paisa/kwh or the charge for deviation corresponding to average grid frequency of the time block, whichever is less.

For under injection in excess 20% of deviation (in this case for 64 MW)- Equivalent to 100% of the cap rate of deviation of 303.04 paisa/kwh or the charge for deviation corresponding to average grid frequency of the time block, whichever is less.

5. The Petitioner in its written submission has submitted the following additional points :

a) The Respondent has been levying a charge known as the Back Up Supply Charges (hereinafter the "BSC") and also levied thereon Fixed Charges purportedly at the rate of Rs. 200/ HP. The Petitioner has submitted numerous representations to the Respondent, requesting the refund of the BSC already collected, the Respondent has blatantly ignored the said representations and has been paying only Rs.2.80 per unit for the exports beyond the schedule, even to this date. However, in fact the BSC has to be accounted as per the UI Rates under the UI Vector. The fact that the Petitioner is being paid only Rs.2.80 per unit has any legal nor logical basis.

b) This rate of Rs.2.80/- per unit seems to emanate from some illegal administrative instructions issued by the Respondents. Quashing these illegal instructions, this Commission in the case of Shamanur Sugars Limited vs. KPTCL & Another in Petition No. 124/MP/2011 vide its order dated 9th October, 2011 has clearly stated that it is a settled principle of law that Statutory Regulations cannot be changed through administrative instructions and in case of conflict between Statutory Regulations and administrative instructions, the former shall prevail. The action of the respondents by inserting an illegal clause in the Standing Clearance (NOC) has virtually changed the provisions of this Commission's Open Access Regulations. Therefore, the clause (m) of the

Standing Clearance (NOC) being in violation of the Open Access Regulations was accordingly set aside.

c) The Commission directed the respondent herein to align its Standing Clearance (NOC) for open access to inter-State transmission with the provisions of the Open Access Regulations and UI Regulations framed by the Commission. Furthermore, the respondents were directed to settle the dues of the petitioner from January 2010 onward in accordance with clause (5) of Regulation 20 of Open Access Regulations after sharing the relevant injection and drawl data with the petitioner. The petitioner herein deserves the same remedy from this Commission

d) The main contention of the Petitioner is that levy of BSC and Fixed Charges are illegal, untenable and opposed to Electricity Act, 2003 (hereinafter referred to as “2003 Act”) and the regulations framed thereunder

e) The Appellate Tribunal, in its Judgment dated 16.4.2019, in the cases of Appeal No. 26 of 2013, Appeal No. 49 of 2013, Appeal no. 144 of 2014 & IA No.244 of 2014, & Appeal no. 166 of 2015 & IA no.269 of 2015 held that if any generating company consumes power from the state grid for any purpose, it is liable to pay supply charges as applicable under the KERC Regulations, 2004 (as amended) and set aside the order of this Commission. However, Shamanur Sugars Limited filed an Appeal before the Hon’ble Supreme Court against the judgment dated 16.4.2019, passed by the Appellate Tribunal. The Appeal is pending before the Hon’ble Supreme Court. Therefore, once an appeal is filed before Hon’ble Supreme Court and the same is pending adjudication, the judgment dated 16.4.2019 of the Appellate Tribunal is in jeopardy. Hence, unless determined by the last Court, the subject matter cannot be said to have attained finality as Hon’ble Supreme Court decided to hear the matter on merit.

f) Although the Appellate Tribunal has held that the liability is to pay supply charges as applicable under the KERC Regulations, 2004 (as amended), the Appellate Tribunal is a Tribunal and not a Court of Record and hence it has no precedential value.

g) As per the judgments of Hon'ble Supreme Court, in M/s. East India Commercial Co. Ltd. Calcutta and another V/s. Collector of Customs, Calcutta, only decisions of such a judicial body will hold precedential value over subordinate courts, if the superior court exercises supervisory and administrative powers over subordinate courts. However, in the case of Appellate Tribunal and this Commission, both are independent, statutory bodies who have been conferred with quasi-judicial powers and Appellate Tribunal has no supervisory or administrative control over this Commission. Therefore, even if the Appellate Tribunal set aside the orders of this Commission and held that the liability is to pay supply charges as applicable under the KERC Regulations, 2004 (as amended), it cannot be binding on this Commission.

Analysis and Decision

6. We have considered the submission of Petitioner and Respondents. Following issue arises for our consideration:

Issue No.1 : Whether back up supply charges/fixed charges shall be governed as per CERC Regulations or State Commission Regulations?

Issue No. 2 : Whether UI charges for over-injection being charged at Rs 2.80 has legal basis?

The issues are dealt in following paragraphs.

Issue No.1: Whether back up supply charges/fixed charges shall be governed under Central Commission Regulations or State Commission Regulations?

7. The issue pertains to levy of back-up supply charges by Karnataka SLDC under Regulation 11 (viii) of KERC Open Access Regulations, 2004 (as amended), which provides as under:-

2. *“Charges for arranging back up supply from the grid shall be payable by the open access customer in the event of failure of contracted supply. In case of outages of generators supplying to a consumer on open access, standby arrangements should be provided by the licensee on payment of tariff for temporary connection to that consumer category as specified by the Commission.*

8. In a similar issue in Petition Nos. 1/MP/2012, 124/MP/2012, 82/MP/2013 and 10/MP/2014, vide Order dated 7.7.2022, we have observed as follows:

36. *The Appellate Tribunal in its judgment dated 16.4.2019 has directed as follows:*

“.....We thus hold that the generating companies provided with Open Access for inter-state transactions under CERC Regulations are not liable to pay any additional charges as per Regulations 20(6), however, any power consumed from the State Grid through the local distribution licensee is chargeable as per the KERC Regulations by considering temporary tariff under relevant category of consumers. However, these supply charges cannot be equated with backup supply charges as being contemplated by the Appellant.

8.8 *In light of these facts and circumstances of the case in hand, we are of the considered opinion that the inconsistencies appearing in various referred orders of CERC in different petitions, as stated supra, need to be corrected through a corrigendum along with clear cut directions that charges for the electricity consumed by the generating companies from the State Grid for any purpose would need to be paid by them as per KERC Regulations.”*

...

9.3.....*As per Section 32 (3), the SLDC is empowered to levy and collect such fee and charges from the generating companies and licensees engaged in Intra-state transmission of electricity as may be specified by the State Commission. Regulation 18 of KERC Regulations, 2006 provide that the charges may be collected either by the distribution licensee, the transmission licensee or the STU depending on whose facility are used for availing opening access. In all such cases, the amount so collected from a particular consumer should be given to a distribution licensee in whose area the consumer is located. In view of these facts, there is nothing illegal that if SLDC issues invoices in lieu of power supply charges on behalf of distribution licensees and collects such charges and in turn remits the amount in the account of local distribution licensee. We are of the opinion that such activities on part of the SLDC/Appellant in no way or amounts to the business of electricity supplies or trading. Hence, we are of the considered opinion that the action of the Appellant in issuing the invoices to the Respondent Generating companies for supply of power from the State Grid is not in violation of law or Regulations.*

As per above APTEL gave a clear finding that power consumed from State grid by generating companies is chargeable as per the KERC Regulations. Further SLDC can levy such charges on behalf of distribution licensee.

37. *Regulation 20 (4) & 20(6) of Central Electricity Regulatory Commission (Open Access in inter-State Transmission) Regulations, 2008 read as under :*

“(4) Any mismatch between the scheduled and the actual drawal at drawal points and scheduled and the actual injection at injection points

for the intra-State entities shall be determined by the concerned State Load Despatch Centre and covered in the intra-State UI accounting scheme.”

(6) In an interconnection (integrated A.C. grid), since MW deviations from schedule of an entity are met from the entire grid, and the local utility is not solely responsible for absorbing these deviations, restrictions regarding magnitude of deviations (except on account of over-stressing of concerned transmission or distribution system), **and charges other than those applicable in accordance with these regulation** (such as standby charges, grid support charges, parallel operation charges) shall not be imposed by the State Utilities on the customers of inter-State open access.”

A reading of above Regulation makes it clear that the mismatch between schedules and actual will be covered in the intra- state UI accounting scheme. Regulation 20 (6) makes it clear that no charges other than those applicable in accordance with these regulations shall be applied on the open access customers.

38. We observe that SLDC Karnataka has replied that in case of under injection by a generating station, it is levying UI charges and no other charges, however in case of drawal from grid, it is levying backup supply charges as per KERC Regulations.

39. An illustrative example to understand the issue is as follows:

Suppose a cogeneration or a captive power plant takes an injection schedule for sale of power through ISTS , however actual injection may vary in different scenarios. The treatment for same as construed from replies filed by Karnataka SLDC is as follows:

	Schedule injection (in a time block)	Actual Injection/Drawal (+/-) (in a time block)	Treatment
Scenario 1	80 MW	0 MW	UI charges for under injection
Scenario 2	80 MW	(-) 20 MW	Bill for consumption of power for 20 MW under backup supply or supply to be raised as per KERC Regulations.
Scenario 3	80 MW	40 MW	UI charges for under injection
Scenario 4	80 MW	90 MW	UI charges for over injection
Suppose there is no sale schedule			
Scenario 5	- MW	(-) 50 MW	Bill for consumption of power for 50 MW under backup supply or supply to be raised as per KERC Regulations.

40. We are of the view that if a generating station which is under State Control area, draws power from state-grid, for any purpose, the same shall not be covered under Regulation 20(6) of Central Electricity Regulatory

Commission (Open Access in inter-State Transmission) Regulations, 2008 and shall be governed by the Regulations of State Commission for payment of charges for such consumption. Our Orders dated 19.11.2012 in Petition No. 1/MP/2012, 24.12.2012 in Petition No. 124/MP/2012, 20.1.2014 in Petition No. 82/MP/2013 and 24.3.2017 in Petition No. 10/MP/2014 stands modified to the extent of above directions.”

41. Accordingly, we are of the view that if a generating station including the Petitioner in instant case, which is under State Control area, draws power from state-grid, for any purpose, the same shall not be covered under Regulation 20(6) of Central Electricity Regulatory Commission (Open Access in inter-State Transmission) Regulations, 2008 and shall be governed by the Regulations of State Commission for payment of charges for such consumption including fixed charges for such consumption.

42. Respondent SLDC has submitted that the present Petition is not maintainable since petitioner has filed the present Petition challenging the bills for the years 2010, 2013 and 2014, with an inordinate delay and the claims made by the Petitioner are barred by limitation.

43. We observe that since we have already concluded at Paragraph 41 that the charges for backup supply/ fixed charges shall be governed by the Regulations of State Commission, we are not inclined to give any direction with respect to issue of limitation.

44. Issue No. 1 is answered accordingly.

Issue No. 2 : Whether UI charges for over-injection being charged at Rs 2.80 has legal basis?

45. Petitioner has raised an issue on rate of UI for over injection considered as Rs 2.80 per unit by the Respondent.

46. Further Regulation 20(5) of 2008 Open Access Regulations provides as follows:

“(5) Unless specified otherwise by the concerned State Commission, UI rate for intra-State entity shall be 105% (for over-drawals or under generation) and 95% (for under-drawals or over generation) of UI rate at the periphery of regional entity.

Provided that all payments on account of Unscheduled Interchange Charge (Deviation Charges) including Additional Unscheduled Interchange Charges (Deviation Charges) and interest and implications for all other aspects of Unscheduled Interchange Charge (Deviation Charges), shall be regulated in accordance with the provisions of Central Electricity Regulatory Commission (Unscheduled Interchange charges and related matters) Regulations, 2009, as amended from time to time or any subsequent re-enactment thereof.”

As per above, the UI rates for intra state entity shall be @95% or @105% of the UI rate at the periphery of regional entity, unless otherwise specified by the State Commission.

47. We observe that Respondent has referred to Office Memorandum dated 26.12.2013 issued by Karnataka Power Transmission Corporation Limited while making payment for excess energy exported at Rs 2.80 per unit. The Office Memorandum is quoted as follows:

“Sub: Issue of NOC by SLDC to Co-generators/Bio-mas/Captive Generators for export of Power from Power Exchange on Short Term Open access (STOA) basis

Ref. Nele No. KPTCL/DT/EA/F/31/415 Dated 18.12 2013

In modification of the present procedure in force in respect of the subject matter, the Chief Engineer Electricity, SLDC, KPTCL is hereby authorized to issue NOC in respect of export of power on STOA basis from Power Exchange duly collecting the prescribed processing fees along with the necessary documents

1) NoC shall be issued to the Generators (List Enclosed) with the following condition:

"The details of actual generation against schedule generation to be monitored on a daily basis. If the actual generation varies from schedule generation by more than 10%, warning to be issued to the Company that the STOA will not be renewed, if the variation persists for more than 10% of the period for which STOA is granted.

For any excess generation, the rate fixed by KERC for old plants only will be paid and not per UI rates. However, for short fall in generation as compared to the

scheduled generation, the firm shall pay UI rates. This will have to be included in the letter while conveying Open Access approval without fail.

2) In case M/s Shamanur Sugars, NoC shall be issued subject to the following condition.

"The details of actual generation against schedule generation to be monitored on daily basis. If the actual generation varies from schedule generation by more than 10%, warning to be issued to the company that the STOA will not be renewed, if the variation persists for more than 10% of the period for which STOA is granted.

For any excess generation by the firm respect to schedule, payment shall made as per the outcome of decision of the W.P. NO 46495/2012 in the High the Court of Karnataka. However, for short fall in generation as compared to the scheduled generation, firm shall pay UI rates. This will have to be included in the letter while conveying Open Access approval without fail.

3) In case M/s JSW Energy Limited, NoC shall issued without any condition. (As per note approved dated 30.07.2013, copy enclosed)

In case of future CERC/KERC/Court directions in this regard, the cases may be reverted back to Director (Transmission) KPTCL

Henceforth, the Chief Engineer Electy, SLDC is directed to issue NoC to generators/Bio-mass/Captive Generators for export of power on STOA basis for Power Exchange subject to the above conditions, pending decision of W. P. N. 46495/2012 by Hon'ble High Court of Karnataka. The Audit shall monitor issue of Open Access transactions."

As per above, for any excess generation, the rate fixed by KERC for old plants only will be paid and not per UI rates. The respondent has not placed on record any directions or Regulations of State Commission in this regard. We observe that Regulation 20(5) of 2008 Open Access Regulations clearly states that unless specified otherwise by the concerned State Commission, UI rate for intra-State entity shall be 105% (for over-drawals or under generation) and 95% (for under-drawals or over generation) of UI rate at the periphery of regional entity. In the absence of any specification by the appropriate Commission, the UI charges for the intra-State entity shall be governed by the Central Electricity Regulatory Commission (Open Access in inter-State Transmission) Regulations, 2008 @ 105% or 95% of UI rate at the

periphery of regional entity, as applicable till the State Commission, issues Regulations / Order in this regard.

48. Issue No.2 is answered accordingly.

49. Petition No. 70/MP/2018 disposed of, in terms of above.

Sd/
(P. K. Singh)
Member

Sd/
(Arun Goyal)
Member

Sd/
(I. S. Jha)
Member